

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DIODORA MONROY
Claimant

V.

TYSON FRESH MEATS, INC.
Self-Insured Respondent

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Docket No. 1,069,413

ORDER

Claimant appealed the June 13, 2016, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on October 13, 2016.

APPEARANCES

Scott J. Mann appeared for claimant. Carolyn M. McCarthy appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

ALJ Fuller found claimant sustained an injury by repetitive trauma to her right upper extremity arising out of and in the course of her employment and awarded her an 11 percent right upper extremity functional impairment at the level of the shoulder and future medical treatment. The ALJ ruled claimant did not sustain a separate injury to her cervical spine.

Claimant contends that in addition to her right shoulder injury, she sustained a cervical spine injury that is directly traceable to her shoulder injury or her repetitive work activities. Claimant requests benefits for a 12 percent whole body functional impairment.

Respondent concedes claimant suffered a work-related right shoulder injury that resulted in an 11 percent right upper extremity functional impairment, but contends claimant did not sustain a cervical spine injury. If the Board finds claimant sustained a cervical spine injury, respondent maintains the injury did not arise out of and in the course

of her employment. Respondent contends claimant has no impairment as a result of her alleged cervical spine injury. Respondent argues future medical treatment should be denied. Respondent asserts claimant suffered her work injury in 2008 and, therefore, her April 17, 2014, application for hearing was not timely.

The issues are:

1. Did claimant sustain a cervical spine injury by repetitive trauma arising out of and in the course of her employment?
2. If so, did such cervical spine injury result in a permanent impairment?
3. Is claimant entitled to future medical treatment?
4. Is the claim barred because claimant failed to file an application for hearing within three years of the date of her work injury or within two years after she was last paid compensation, whichever is later?

FINDINGS OF FACT

Claimant is 71 years old, right-hand dominant and has worked for respondent for 20 years. Claimant testified that beginning in 2005, she performed a job pushing barrels. After performing that job for two years, her right arm, right shoulder and neck began hurting. She would tell her boss and he would send her to the company nurse.

In 2008, claimant reported a right shoulder injury to her boss, but did not file a claim for workers compensation. She eventually was moved to another job. Claimant treated with her personal physician and received injections. She indicated that from 2008 until 2014, her right arm, right shoulder and neck worsened. She saw the company nurses "[l]ots and lots and lots and lots."¹ Claimant indicated she could not use her right hand, comb her hair, take a shower or get dressed.

By order of the ALJ, claimant was evaluated by orthopedic surgeon Dr. Pat D. Do on September 8, 2014. Claimant's primary complaint was her right shoulder and she reported having to use her left arm to raise her right arm. The doctor noted claimant had no diagnostic studies of her right shoulder and he recommended an MRI. His physical examination disclosed tenderness in the cervical spine, no nerve root tension signs, quite a bit of weakness to the right rotator cuff, some crepitus with motion and some signs of impingement. Her sensation was intact. Dr. Do's impression was right shoulder pain and he suspected she had a right rotator cuff tear. In his report, the doctor stated:

¹ R.H. Trans. at 11.

Within a reasonable degree of medical probability, her current need for treatment and her complaints of right shoulder and upper extremity complaints and posterior scapula pain, and pain radiating up her neck is a natural probable consequence of aging and her right shoulder rotator cuff injury. This is on a prevailing factor basis.

My rationale behind this is, I got her work history and whereas that may have some small aggravation or contribution, at age 69 about to turn age 70, and within the last 8 months causing a lot more pain, I think her age has a lot more to do with her current right shoulder complaints than it is her work.²

When asked if claimant's cervical spine tenderness was a natural and direct result of her right shoulder injury, Dr. Do testified:

Q. . . . With regards to her complaints on examination, her cervical spine is a bit tender on the right paraspinal cervical spine. For a layperson, describe where that's at.

A. So that's on the -- her complaints are to her right shoulder, and the right side of her neck when you push on it is -- she describes it as painful.

Q. All right. Is that something you typically see when someone has a rotator cuff injury to their shoulder?

A. It's not uncommon.

Q. And would that be a natural and direct result of the shoulder injury?

MR. MUNSELL: Assumes facts not in evidence.

A. Scott, it can -- when you have an injured shoulder, those muscles go into spasm to help protect an injured shoulder. It's just a natural body response. Those same muscles attach up into the neck, so it's a normal response for a shoulder injury. But if you're asking is it a separate neck injury itself, then no. It's just a -- it's a reflex protection mechanism that your body has to protect the shoulder.³

Dr. Do also testified:

Q. So ultimately your opinion regarding prevailing factor is based on history. If the Court believes she started having problems in '08, reported them, saw the company nurse, and the problems got worse over time until '14, you believe the work is the prevailing factor, true?

² Do. Depo., Ex. 2 at 2.

³ *Id.* at 16-17.

A. Yes.

Q. If the Court believes she didn't really have any problems until eight months before 2014, then you think it's an age-related situation.

A. Yes.⁴

Dr. Do was not asked to rate claimant's right shoulder or her cervical spine. Nor was he asked if, more probably than not, claimant needed future medical treatment for her right shoulder or cervical spine. However, in his report, the doctor recommended an MRI of claimant's right shoulder and physical therapy, anti-inflammatories and injections to avoid surgery. He indicated claimant needed no permanent restrictions.

At Dr. Do's deposition, a form entitled "Injury/Illness Information" was introduced. The document is dated January 16, 2014, and signed by a licensed practical nurse (LPN) employed by respondent and claimant. The form indicated claimant reported right upper extremity, neck and scapula injuries. The form indicated repetitive motion was the object or substance that directly harmed claimant. The date of injury was listed as January 16, 2014. A second form entitled "Team Member Statement of Injury/Illness," dated January 17, 2014, and signed by the same LPN and claimant, indicated the date of injury was 2008.

Claimant, at the request of her counsel, was evaluated by Dr. C. Reiff Brown, an orthopedic physician, on April 3, 2014. Claimant reported having right shoulder pain from retrieving cow tails, one at a time, from a bucket with her right hand, which she did for many years. The shoulder pain gradually increased in severity. She reported her right shoulder condition as a work injury in January 2014. The doctor noted claimant was treated with medications and shoulder injections. Dr. Brown's April 2014 report makes no mention of cervical spine complaints or a cervical spine injury. The doctor provided claimant with permanent restrictions and indicated claimant should be referred to an orthopedic surgeon.

Dr. Brown re-evaluated claimant on January 7, 2016. The doctor indicated claimant's physical examination was "essentially the same as it was in April 2014 except for the fact that there has been an increase in her loss of range of motion of the right shoulder and she has developed a myofascial pain syndrome with the involvement of scapular musculature with trigger points distributed in a typical distribution for that diagnosis."⁵ Dr. Brown testified he also thought claimant aggravated or rendered symptomatic a degenerative problem in her cervical spine. He opined the prevailing factor causing claimant's condition was her repetitive work.

⁴ *Id.* at 30.

⁵ Brown Depo., Ex. 3 at 2.

Dr. Brown acknowledged reviewing Dr. Do's September 8, 2014, report. However, he testified that after an evaluation he destroys the patient's medical records and although he thought he reviewed additional records, he did not have a specific recollection of doing so.

Utilizing the *Guides*,⁶ Dr. Brown assigned claimant a 5 percent whole person functional impairment (DRE Cervicothoracic Category II) for her myofascial pain syndrome and a 5 percent whole person functional impairment (DRE Cervicothoracic Category II) for a cervical sprain and aggravation of preexisting disc and facet changes. The doctor acknowledged he had no diagnostic images showing claimant had preexisting disc or facet changes. In his report, Dr. Brown opined claimant also had a 15 percent right upper extremity functional impairment. The three ratings combined for an 18 percent whole person functional impairment. At his deposition, Dr. Brown amended his right upper extremity rating to 11 percent.

Dr. Brown assigned claimant permanent restrictions and recommended she be sent to an orthopedic surgeon specializing in upper extremity treatment. Dr. Brown thought claimant should start with conservative treatment such as physical therapy, range of motion exercises, possible shoulder injections and anti-inflammatory medications. If that approach failed, then surgery would be appropriate.

The ALJ found:

Dr. Do did not define a separate neck injury. He did not rate the shoulder either as he felt it was age related. Dr. Brown did rate the shoulder and the cervical spine but acknowledged he did not have diagnostic imaging to show degeneration of the cervical spine or facet arthrosis and that there was no radiculopathy or structural inclusions. Dr. Brown gave an 11% permanent partial disability to the shoulder. Based on the evidence presented, it is found that the claimant suffered a shoulder injury, but not a separate injury to her cervical spine. Therefore, it is found that the claimant suffers an 11% permanent partial impairment to her right upper extremity at the level of the shoulder.

2. The claimant is entitled to unauthorized medical not to exceed \$500.00.

3. The claimant is entitled to future medical treatment only upon proper application to and approval by the Director of Workers Compensation.

When Dr. Brown evaluated the claimant, he recommended additional medical care in the form of a referral to an orthopedic surgeon for additional testing and appropriate treatment.

⁶ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Do recommended additional testing and appropriate treatment although he did not believe it was work related.⁷

The ALJ did not address respondent's argument that the claim is barred because claimant failed to file an application for hearing within three years of the date of her work injury or within two years after she was last paid compensation, whichever is later.

PRINCIPLES OF LAW AND ANALYSIS

1. Claimant timely filed her application for hearing.

K.S.A. 44-534(b) states:

No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

In its submission letter to the ALJ, respondent argued claimant's claim is barred because she failed to meet the requirements of K.S.A. 44-534(b). The ALJ did not address the issue in the Award. At oral argument, claimant requested the Board decide this issue and not remand it to the ALJ. Respondent requested the Board remand the issue to the ALJ.

The Board, in order to serve judicial economy, will consider this issue. The Board sees no useful purpose in delaying this matter by remanding the issue to the ALJ. While the ALJ did not explicitly mention this issue, she concluded claimant's date of injury by repetitive trauma was April 3, 2014. If this date of injury is correct, claimant's application for hearing, filed on April 17, 2014, was timely.

The pertinent language of K.S.A. 2008 Supp. 44-508(d) states:

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based

⁷ ALJ Award at 4-5.

on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.

Respondent asserts claimant's date of accident/injury was in 2008. Therefore, her application for hearing was not timely filed. None of the triggering events set forth in K.S.A. 2008 Supp. 44-508(d) occurred in 2008. There is insufficient evidence that in 2008, a physician took claimant off work or restricted her work activities, claimant gave written notice of a work injury or a physician communicated in writing to claimant that her injuries were work related.

Conversely, K.S.A. 2013 Supp. 44-508(e) establishes claimant's date of injury by repetitive trauma is April 3, 2014. That statute, in part, provides:

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

Of the triggering events set forth in K.S.A. 2013 Supp. 44-508(e), the earliest that occurred in this claim was Dr. Brown's April 3, 2014, imposition of permanent restrictions. Therefore, claimant's April 17, 2014, application for hearing was timely.

2. Claimant suffered right shoulder and cervical spine injuries by repetitive trauma on April 3, 2014, arising out of and in the course of her employment and sustained a 12 percent whole person functional impairment.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁸ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue

⁸ K.S.A. 2013 Supp. 44-501b(c).

is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”⁹

Claimant asserts she sustained permanent impairment to her right shoulder and cervical spine. Claimant asserts her cervical spine injury was the direct and natural consequence of her shoulder injury. In *Bryant*,¹⁰ the Kansas Supreme Court indicated it was following the rule established in *Fogle*,¹¹ that when determining whether a claimant has sustained a scheduled or a non-scheduled disability it is the situs of the resulting disability, not the situs of the trauma, which determines the workers compensation benefits available.

Dr. Do indicated that if claimant started having problems in 2008, reported them, saw the company nurse and the problems worsened over time until 2014, claimant’s work was the prevailing factor for her injuries. The ALJ focused on Dr. Do’s opinion that claimant did not have a separate cervical injury. As noted in *Bryant* and *Fogle*, it is not the situs of the injury, but the situs of the resulting disability, that determines the workers compensation benefits to which claimant is entitled.

Claimant testified she had shoulder, arm and neck pain from 2008 until 2014 and complained to her boss and numerous times to plant nurses. Her testimony in that regard is credible, uncontradicted and uncontroverted. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.¹²

Dr. Do indicated claimant’s cervical spine tenderness was referred from her right shoulder. As indicated above, he acknowledged claimant’s work was the prevailing factor if claimant started having problems in 2008, reported them, saw the company nurse and her problems worsened over time until 2014. In *Jackson*,¹³ the Kansas Supreme Court stated, “We find that when a primary injury under the Workmen’s Compensation Act is shown to have arisen out of and in the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.”

The foregoing facts convince the Board that claimant suffered right shoulder and cervical spine injuries by repetitive trauma arising out of and in the course of her

⁹ K.S.A. 2013 Supp. 44-508(h).

¹⁰ *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

¹¹ *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

¹² *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

¹³ *Jackson v. Stevens Well Service*, 208 Kan. 637, 643, 493 P.2d 264 (1972).

employment. Claimant's legal date of injury is April 3, 2014, due to her repetitive work and as a direct and natural result of her right shoulder injury. The Board further finds claimant has a 5 percent whole person functional impairment for her cervical spine injury which combines with her 11 percent right upper extremity impairment for a 12 percent whole person functional impairment. Dr. Brown opined claimant has two separate 5 percent functional impairments for her cervical spine and placed her in DRE Cervicothoracic Category II. Claimant indicated in her brief that she is seeking only a 5 percent rating for her cervical spine impairment. Thus, the Board finds claimant has a 5 percent functional impairment for her cervical spine injury.

3. Claimant is entitled to future medical treatment for her right shoulder and cervical spine injuries.

The Board is persuaded claimant is entitled to future medical treatment. Dr. Do recommended an MRI of claimant's right shoulder and physical therapy, anti-inflammatories and injections. Dr. Brown recommended claimant see an orthopedic surgeon specializing in the upper extremities. Their opinions are sufficient medical evidence to overcome the presumption against future medical treatment set forth in K.S.A. 2013 Supp. 44-510h(e).

CONCLUSION

1. Claimant timely filed her application for hearing.

2. Claimant suffered right shoulder and cervical spine injuries by repetitive trauma on April 3, 2014, arising out of and in the course of her employment. Claimant has a 5 percent whole person functional impairment for her cervical spine injury which combines with her 11 percent right upper extremity impairment for a 12 percent whole person functional impairment.

3. Claimant is entitled to future medical treatment for her right shoulder and cervical spine injuries upon proper application.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁴ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

¹⁴ K.S.A. 2015 Supp. 44-555c(j).

AWARD

WHEREFORE, the Board modifies the June 13, 2016, Award entered by ALJ Fuller by finding claimant has a 12 percent whole person functional impairment. Claimant is entitled to 49.80 weeks of permanent partial disability compensation at the weekly rate of \$316.77 for a 12 percent whole person functional impairment, making a total award of \$15,775.15, all of which is due and owing, less any amounts previously paid.

Claimant is entitled to apply for future medical treatment for her right shoulder and cervical spine injuries.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Pamela J. Fuller, Administrative Law Judge